

IN THE HIGH COURT AT CALCUTTA  
Ordinary Original Civil Jurisdiction  
ORIGINAL SIDE

**Present:**

**The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA**

**A.P.411 of 2020**

**The Kolkata Municipal Corporation**

**Vs.**

**Jain Infraprojects Limited**

For the Petitioner : Mr. Biswajit Mukherjee, Adv.  
Mr. Ambarnath Banerjee, Adv.  
Ms. Manisha Nath, Adv.

For the Respondent : Mr. Joy Saha, Sr. Adv.  
Mr. Sanjib Kr. Mal, Adv.  
Mr. Atanu Roychowdhuri, Adv.  
Mr. Pushan Majumder, Adv.  
Ms. Asmita Roychowdhuri, Adv.

Last Heard on : 15.01.2021.

Delivered on : 22.02.2021.

**Moushumi Bhattacharya, J.**

1. A preliminary point has been raised by the respondent in the present challenge to an Award under section 34 of The Arbitration and Conciliation Act, 1996. The respondent contends that the application for setting aside of

the Award filed by the petitioner is barred by limitation and should, therefore, be dismissed.

2. Mr. Joy Saha, learned Senior Counsel appearing for the respondent, places the relevant dates for the question of maintainability and urges that the petitioner has not taken any steps in having the initial delay in filing of the Award, condoned. Counsel relies on *Union of India vs. Popular Construction Co.*; (2001) 8 SCC 470 and *Simplex Infrastructure Limited vs. Union of India*; (2019) 2 SCC 455 for the proposition that section 5 of The Limitation Act, 1963 would not apply to section 34 of the 1996 Act. Counsel cites *Maqbul Ahmed & Ors. vs. Pratap Narain Singh & Ors.*; AIR 1935 PC 85 and *Sri Amar Chand Inani Vs. Union of India*; (1973) 1 SCC 115 for the proposition that when a plaint is filed in a wrong court, the time consumed between passing of the order returning the plaint and re-filing of the plaint cannot be excluded. Two recent orders of the Supreme Court dated 23<sup>rd</sup> March, 2020 and 18<sup>th</sup> September, 2020 passed in *Suo Moto Writ Petition (C) No.3/2020* and in *Sagufa Ahmed vs. Upper Assam Plywood Products Pvt. Ltd. (Civil Appeal Nos.3007-3008 of 2020)* respectively, have been relied upon to urge that by the said orders, the Supreme Court extended the period of limitation due to the pandemic but not the period up to which delay can be condoned in exercise of discretion by the particular statute. Counsel also relies on an order passed in *Siddha Real Estate Development Private Limited Vs. Girdhar Fiscal Services Private Limited* in C.S. No.245 of 2019.

3. Mr. Biswajit Mukherjee, learned counsel appearing for the petitioner, contends that there has only been a delay of 22 days in filing the section 34

application in the Alipore Court and by an order dated 15<sup>th</sup> October, 2020, the Alipore Court directed that the section 34 application along with all annexures should be returned to the petitioner for filing before the competent court of jurisdiction in Kolkata. Counsel submits that the certified copy of this order was received on 20<sup>th</sup> October, 2020 and the petitioner received the other documents only on 22<sup>nd</sup> December, 2020 on which day the present application was filed before this court. Counsel relies on an order dated 10<sup>th</sup> July, 2020 passed by the Supreme Court in *Suo Motu Petition (C) No.3 of 2020* by which upon considering the lockdown in view of Covid, the Supreme Court, following earlier orders dated 23<sup>rd</sup> March, 2020 and 6<sup>th</sup> May, 2020 allowed extension of all periods of limitation prescribed under the 1996 Act with effect from 15<sup>th</sup> March, 2020 till further orders.

4. Upon hearing learned counsel appearing for the parties, the relevant dates central to the issue of maintainability, namely, the delay in filing of the section 34 application, are stated in brief.

5. The impugned Award was passed on 15<sup>th</sup> February, 2019 and received by the petitioner on 27<sup>th</sup> February, 2019, the application under section 34, challenging the Award was filed by the petitioner before the Commercial Court, South 24-parganas on 18<sup>th</sup> June, 2019. On 15<sup>th</sup> October, 2020, the Commercial Court, South 24-Parganas passed an order holding that it had no jurisdiction to entertain the application under section 34 of the 1996 Act and directed return of the petition for being filed before the appropriate court. The petitioner received the certified copy of the aforesaid order on 20<sup>th</sup>

October, 2020. The Puja vacation of the Calcutta High Court commenced from 22<sup>nd</sup> October, 2020 and the Court re-opened after the Puja vacation on 17<sup>th</sup> November, 2020. The present application under section 34 of the 1996 Act was filed by the petitioner on 22<sup>nd</sup> December, 2020.

6. Under section 34(3) of the 1996 Act, an application for setting aside of an Award may not be made after three months from the date on which the party making that application had received the arbitral award or, within a further period of 30 days if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the first window of three months. The language of section 34 is peremptory; as suggested by the inclusion of words “.....*may not be after three months.....*” and “.....*within a further period of 30 days, but not thereafter.*” The words indicate that the first window of three months may be followed by an additional and final window of 30 days subject to the court being satisfied that the applicant had sufficient reasons for not making the application within the initial period of three months.

7. In the present case, the petitioner filed the section 34 application before the Alipore Court on 18<sup>th</sup> June, 2019 after having received the Award on 22<sup>nd</sup> February, 2019. Hence, the petition was filed after 112 days; after an initial delay of 22 days. The fact that the Commercial Court, South 24-Parganas, passed an order on 15<sup>th</sup> October, 2020, directing return of the application cannot be of assistance to the petitioner for the following reasons. On the date of filing of the section 34 application before the

Commercial Court, namely, on 18<sup>th</sup> June, 2019, the petitioner could not have known of the outcome of the proceedings namely the order of the Commercial Court on lack of jurisdiction. There was already a delay of 22 days on the date of filing itself. Hence, the contention that the petitioner was constrained to file the present application in this court solely in view of the order of the Commercial Court returning the application, cannot turn the clock back for the purposes of limitation. Second, the argument made on behalf of the petitioner that the present application was filed on the very day when the additional papers were received by the petitioner from the learned court below, i.e., on 22<sup>nd</sup> December, 2020, cannot save the petitioner from the rigours of section 34(3) of the 1996 Act. This is due to the reason that the present application does not disclose the basis for the petitioner receiving the additional papers from the learned court on 22<sup>nd</sup> December, 2020 when the order of the Court was passed on 15<sup>th</sup> October, 2020 and the certified copy was received on 20<sup>th</sup> October, 2020.

8. The present application for condonation of the delay is singularly bereft of any reasons as to why the petitioner waited for two months after receiving the certified copy of the order passed by the Commercial Court. There is also no averment of the steps taken by the petitioner in expediting the process for obtaining the additional documents from the learned court below as evidence of promptitude on the part of the petitioner. Besides the aforesaid factors, the initial delay of 22 days in filing the application under section 34 before the Commercial Court remained till filing of the present application in this court. The submissions made on behalf of the petitioner

with regard to the factors contributing to the delay are uncorroborated either by way of pleadings or documents in that regard.

9. Learned counsel for the petitioner has relied on an order dated 10<sup>th</sup> July, 2020 passed by the Supreme Court in *Suo Motu Writ Petition (C) No.3/2020* in which an earlier order of 23<sup>rd</sup> March, 2020 extending all periods of limitation prescribed under The Arbitration and Conciliation Act, 1996 with effect from 15<sup>th</sup> March, 2020 has been referred to. This order, however, has to be read in the context of the judgment of the Supreme Court in *Sagufa Ahmed vs. Upper Assam Plywood Products Pvt. Ltd. (Civil Appeal Nos.3007-3008 of 2020)* dated 18<sup>th</sup> September, 2020 which clarified the order dated 23<sup>rd</sup> March, 2020 in *Suo Motu Writ Petition (C) No.3/2020* and held that what was extended by the order dated 23<sup>rd</sup> March 2020 was only the period of limitation and not the period up to which delay can be condoned in exercise of discretion by the statute. It should also be stated that in said Writ Petition the first order of the Supreme Court dated 23<sup>rd</sup> March, 2020 was intended to benefit vigilant litigants who were prevented due to the pandemic and the ensuing lockdown from initiating proceedings within the period of limitation prescribed by general or special law. This is the specific observation of the Supreme Court in *Sagufa Ahmed*. The order of the Supreme Court dated 17<sup>th</sup> December, 2020 passed in *M/s. SS Group Pvt. Ltd. vs. Aaditiya J. Garg in Civil Appeal No.4085 of 2020* was passed on the specific facts of that case, namely a delay of four days in filing the written statement before the National Commission.

10. The order of the Supreme Court in *Sagufa Ahmed* clarifies that the expression “*prescribed period*” in section 4 of The Limitation Act 1963 cannot be stretched to mean anything other than the period of limitation and that any period beyond the prescribed period would fall outside the period of limitation in which the court specifically has the discretion in allowing a person to institute certain proceedings. In the present case, the prescribed period of limitation under section 34(3) of the Act would be three months from the date on which the party making the application has received the arbitral award. Since the petitioner received the impugned Award on 27<sup>th</sup> February, 2019, the prescribed period under section 34(3) of the Act expired on 27<sup>th</sup> May, 2019. The application under section 34 was filed by the petitioner on 18<sup>th</sup> June, 2019 after 112 days from the date of receipt of the Award by the petitioner and hence after a delay of 22 days. Section 34(3) contemplates that an applicant, who has failed to file the application under section 34 within the first three months, must take the leave of the court and upon such leave being granted, and upon the court being satisfied of the reasons shown, can be permitted to take the benefit of the additional 30 days. The words of the proviso make it sufficiently clear that the additional period of 30 days cannot follow as a matter of course and without the intervention of the court granting the leave as contemplated in the proviso.

11. The petitioner in this case, did not take steps for seeking condonation of the delay of 22 days before the Commercial Court and allowed the said delay to continue till filing of the present application. *Sagufa Ahmed* also

makes it clear that the order extending all periods of limitation is restricted only to those litigants who have shown vigilance but have otherwise been prevented from taking requisite steps by reason of the pandemic. Unfortunately, the petitioner before this court has not exhibited conduct akin to that noted in *Sagufa Ahmed*. It is also not the case of the petitioner that the petitioner was prevented from taking appropriate steps by reasons of the pandemic. Moreover, although the certified copy of the order of the Commercial Court was received by the petitioner on 20<sup>th</sup> October, 2020, the present application was filed almost five weeks after the court re-opened after the Puja vacation. The petitioner has given no explanation for the intervening period of delay or the absence of requisite steps which should have been taken by the petitioner in the interregnum.

12. *Simplex Infrastructure* dealt with the question whether the benefit of sections 5 and 14 of The Limitation Act can be extended to a party when there has been a delay beyond the specific statutory limitation prescribed under section 34(3) of the 1996 Act. In coming to the decision that the delay in filing of the section 34 application could not have been condoned, the Supreme Court considered two earlier decisions in *Popular Construction Co.* and *Consolidated Engineering Enterprises vs. Irrigation Department*; (2008) 7 SCC 169 which held that section 5 of The Limitation Act could not be made applicable to section 34 of the 1996 Act and that section 14 of The Limitation Act would be applicable to a section 34 application, respectively. *Sri Amar Chand Inani* has been cited on behalf of the respondent on the issue whether the plaintiff in that case was entitled to the benefit of section

4 of The Limitation Act. In the facts of that case, the Supreme Court found the suit to be barred by limitation by reason of the fact that when the plaint was returned for presentation to the proper court, the suit can be deemed to be instituted in the proper court only when the plaint was presented in that court. Since both the decisions cited on behalf of the respondent, proceed on the applicability of sections 4 and 14 of The Limitation Act to an application under Section 34 of the 1996 Act which point has not been argued on behalf of the petitioner, further discussion on these decisions is not relevant.

13. A.P.411 of 2020 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

**(MOUSHUMI BHATTACHARYA, J.)**